INSAS BHD.

v.

NADINUSA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN SCJ
[SUIT NO. D1-22-127-88]
5 JUNE 1992

CIVIL PROCEDURE: *Injunction - Preventive relief - Discretion of the Court - Injunction - Whether transaction between parties contrary to Moneylenders Ordinance 1951 - Whether the defendant was an unlicensed moneylender - Whether contract being rendered unenforceable prevents defendant from claiming repayment - Injunction to restrain defendant from presenting petition to wind-up plaintiff - Sections 50, 51 of Specific Relief Act 1950 (Revised 1974) - Companies Act 1965.*

This case involved the grant of preventive relief at the discretion of the Court by injunction in accordance with ss. 50 & 51 of the Specific Relief Act 1950 (Revised 1974).

On 28 June 1988, the plaintiff sought the following relief against the defendant:

(i) a declaration that the defendant has been carrying on the business of an unlicensed moneylender contrary to Moneylenders Ordinance 1981;

(ii) a further declaration that the defendant is barred from claiming repayment is rendered unenforceable.

(iii) an injunction restraining the defendant from presenting any petition to wind-up or advertise such intention under the Companies Act 1965.

On the same day the plaintiff obtained a temporary injunction against the defendant restraining it from presenting any petition to wind-up under the Companies Act 1965.

The main issue was whether the transaction between the parties was contrary to the provisions of Moneylenders Ordinance 1951 and whether, the defendant, being an unlicensed moneylender, can legally demand the repayment of the outstanding sums.

Held:

[1] There is no material evidence to show that the defendant is a moneylender.

[2] The Moneylenders Ordinance does not strike at moneylending but only at moneylenders and their loans.

[3] The plaintiff had reached a *bona fide* compromise of the question of fact whether the loans were unlawful moneylending transactions and the Court would not go behind the compromise as both parties were represented and advised by competent lawyers. The agreement is binding and should not be reopened.

[4] An interim injunction should not have been granted in chambers four years ago as the plaintiff had not shown that there was a serious question to be tried on substantial grounds.

[Interim injunction reversed. Plaintiff's summons-in-chambers dismissed with costs.]

[Editorial Note: The plaintiff has appealed to the Supreme Court *vide* Supreme Court Civil Appeal No. D1-22-127-88]

Cases referred to:
Bryanston Finance Ltd. v. De Vries (No. 2) [1976] 1 All ER 25 ***(cit)***
Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 1 CLJ (Rep) 5 ***(cit)***
Morgan Guaranty Trust Co. of New York v. Lian Seng Properties Sdn. Bhd. [1991] 1 CLJ (Rep) 317 ***(cit)***
Yeep Mooi v. Chu Chin Chua & Ors. [1981] 1 MLJ 14 ***(cit)***
Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9 ***(cit)***
Kurt Keller Pty. Ltd. & Ors. v. BMW Australia Ltd. & Ors. [1984] 1 NSWLR 353 ***(cit)***
Kolback Securities Ltd. v. Epoch Mining NL [1987] 8 NSWLR 533 ***(cit)***
Binder v. Alachouzos [1972] 2 QBD 151 ***(cit)***
Holsworthy Urban District Council v. Rural District Council of Holsworthy [1907] 2 Ch 62 ***(cit)***
Fortuna Holdings Pty. Ltd. v. Deputy Federal Commissioner of Taxation [1978] VR 83; [1976-1977] 2 ACLR 349 ***(cit)***
T. Chellappah v. Official Assignee [1971] 1 MLJ 24 ***(cit)***
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(cons)***
Associated British Ports v. Transport and General Workers Union [1989] 1 WLR 939 ***(foll)***

Legislation referred to:
Moneylenders Ordinance 1951, s. 3
Specific Relief Act 1950, ss. 50, 51

Other source referred to:
Laws of England, Halsbury's, 4th Edn., Vol. 9, para. 431

For the plaintiff - Robert Lazar (Lim Kian Leong with him); M/s. Lim Kian Leong & Co.
For the defendant - G. Sri Ram (Fiona M. Bodipalar with him); M/s. Sri Ram & Co.

JUDGMENT

Gunn Chit Tuan SCJ (Si Hung as a Judge in the High Court):

This case involves the grant of preventive relief at the discretion of the Court by injunction in accordance with ss. 50 & 51 of the Specific Relief Act 1950, (Revised 1974).

On 28 June 1988, Insas Bhd. (Insas) issued a writ against Nadinusa Sdn. Bhd. (Nadinusa) claiming principally the following relief:

(i) a declaration that the defendant has been carrying on the business of an unlicensed moneylender contrary to the provisions of the Moneylenders Ordinance 1951;

(ii) a further declaration that the defendant is barred from claiming from the plaintiff repayment of any sum of money lent to the plaintiff by reason of the contract for the repayment of the money lent being rendered unenforceable;

(iii) an injunction restraining the defendant by themselves, their servants or agents or otherwise howsoever from presenting any petition under the Companies Act 1965, to wind-up the plaintiff or from advertising their intention to present such a petition or of having presented any such petition.

On the same day Insas also took out a summons-in-chambers seeking a temporary injunction against Nadinusa restraining it from presenting any petition under the Companies Act 1965, to wind-up Insas.

The most important point in this case raised by Insas was whether the transaction between it and Nadinusa is caught by the provisions of the Moneylenders Ordinance 1951, and whether Nadinusa, being an unlicensed moneylender, can legally demand the repayment of the sums said to be outstanding to it. Mr. Sri Ram, leading Counsel for Nadinusa, referred

me to *Bryanston Finance Ltd v. De Vries* (No. 2) [1976] 1 All ER 25, in which the U.K. Court of Appeal held *inter alia* that the company concerned was only entitled to interlocutory relief to prevent anticipated litigation if, on the available evidence, it could be said that presentation of a petition would *prima facie* be an abuse of process. The Court should not interfere with what would otherwise be a legitimate petition unless there were sufficient *prima facie* evidence. In that case it was held that the company concerned had failed to make out a sufficient *prima facie* case to justify the grant of an injunction.

Then after referring to *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 1 CLJ (Rep) 5, in which case the Supreme Court held that the amount of the admitted and unpaid debt was substantial and therefore the appellant in that case should not be prevented from pursuing its petition so that the Court would be able to consider all the evidence and determine whether it should exercise its discretion to order winding-up or not, it also held that the evidence placed before the Court did not establish that the purpose of the appellant in bringing the petition was to put pressure on the respondent company and thereby to induce it to pay a sum which was not due and owing and to cause irreparable damage to the respondent company by advertisement of the petition. The Court also held that the Companies (Winding-up) Rules 1972, require every petition to be advertised and it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding-up. Even if the advertisement would in fact cause such damage, it was not a ground to prevent a *bona fide* petitioner from advertising.

Reference was also made to *Morgan Guaranty Trust Co. of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 CLJ (Rep) 317, in which case the Supreme Court, through a judgment delivered by Hashim Yeop A. Sani CJ (Malaya), also held that *prima facie* a creditor is entitled to petition for a winding-up against a company which fails to pay its debts.The creditor should not be prevented from pursuing its petition so that the Court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not.

Mr. Sri Ram then submitted that Nadinusa is not a moneylender. He referred to *Yeep Mooi v. Chu Chin Chua & Ors.* [1981] 1 MLJ 14 in which case the former Federal Court had observed that the Moneylenders Ordinance 1951, does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual or any member of the public who lends money even at interest, unless he does so as a business. *Ngui Mui Khin & Anor v. Gillespie Bros. & Co. Ltd* [1980] 2 MLJ 9. The Court also held that s. 3 of the said Ordinance which presumes that any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed, unless the contrary be proved, to be a moneylender, is a presumption which is not irrebuttable.

Counsel then referred to the following letters appearing on pp. 21, 22, 31 & 32 attached to the affidavit of one Tan Toh Heong, the group general manager of Insas Bhd., dated 28 June 1988, filed in support of Insas's application for an injunction:

Shearn Delamore & Co,
2, Benteng, 50050 Kuala Lumpur.

Our Ref: SD 850373 (ML) 20 March 1987.

Without Prejudice

Messrs. Sri Ram, Zulkifly & Kumar,
Advocates & Solicitors,
Suite 2003, 20th Floor,

Wisma Hamzah Kwong Hing,
No. 1, Leboh Ampang,
50100 Kuala Lumpur.

Dear Sirs,

Re: Nadinusa Sdn. Bhd.

We act for and on behalf of Paper Products (Malaya) Bhd, and we refer to your letter of 9 March 1987.

We will be disputing the debt claimed by you on the grounds that your client is an unlicensed moneylender. As such, we are of the humble opinion that you cannot proceed by way of a s. 218 notice.

However, on a strictly without prejudice basis, our client has written to you on 10 March 1987, offering to pay RM5,000 in monthly instalments on condition that your client waive interest. Please let us know whether your client is agreeable to our client's offer.

Yours faithfully,

Sgd.

Sri Ram, Zulkifly & Kumar,
Suit 2003, 20th Floor,
Wisma Hamzah Kwong Hing,
No. 1, Leboh Ampang,
50100 Kuala Lumpur.

Our Ref: LS/hf/2/4832/87 Date: 9 April 1987

Messrs. Shearn Delamore & Co.
Advocates & Solicitors
2 Benteng
50050 Kuala Lumpur

Dear Sirs,

Re: Paper Products (M) Bhd

We refer to your letter dated 20 March 1987.

We beg to differ with your views on the legality of the advancement as referred to in para. 2 of your letter.

We respectfully suggest that a review of the elements of moneylending would clearly indicate that such a defence is completely without its merits.

We are instructed by our client to inform you that your client's proposals are unacceptable.

Yours faithfully

Sgd.

Sri Ram, Zulkifly & Kumar,
Suite 2003, 20th Floor,
Wisma Hamzah Kwong Hing,
No. 1, Leboh Ampang,
50100 Kuala Lumpur.

Your Ref: SD 850373 (ML)

Our Ref: LS/hf/2/4832/87 Date: 15 July 1987

Messrs. Shearn Delamore & Co.
Advocates & Solicitors By Fax
Kuala Lumpur
fao*: Mr. Michael Lim*

Strictly Without Prejudice

Dear Sirs,

Re: Nadinusa Sdn. Bhd/Paper Products (Malaya) Bhd.

We refer to the above matter and the recent telephone conversation between your Mr. Michael Lim and our Mr. Logan Sabapathy.

Our clients instruct us that they are agreeable to withdrawing the above petition only upon the following terms:

(a) that your client undertake to pay our clients a sum of RM50,000 on or before 17 July 1987, and further a sum of RM90,000 by way of nine (9) equal monthly instalments commencing 17 August 1987. At the expiry of the ninth month, your client shall pay our client the full balance sum together with accrued interests as referred to in the letter of demand;

(b) that your client provides a suitable unconditional admission of the debt in question; and

(c) that in event that your client defaults, our clients shall be at liberty to present a fresh petition.

We regret to inform you that our clients are unable to accept the sum of RM250,000 in full and final settlement.

Kindly let us have your client's confirmation to enable us to arrange to withdraw the petition.

Thank you.

Yours faithfully,

Sgd.

Fax
From
Shearn Delamore & Co.

No. 2, Benteng, 50050 Kuala Lumpur

Our Ref: SD 850370 (ML)
Your Ref: LS/hf/2/4832/87

To Messrs. Sri Ram, Zulkifly & Kumar
For Vijaya Kumar
From Michael Lim

Date: 17 July 1987

Re: Nadinusa Sdn. Bhd./Paper Products (Malaya) Bhd.

Your fax 15 July 1987 refers.

We now have instructions from our client that they accept the conditions (a), (b) and (c) listed in your fax. We undertake to provide you with our cheque for RM50,000 before the end of today.

As discussed with your Mr. Vijaya Kumar, you will today provide us with a letter confirming that the petition has been withdrawn with the leave of the Court and that it has been filed owing to a miscommunication and misunderstanding between the parties involved.

Sgd.

Counsel pointed out that there has been an unconditional acceptance of the debt in this case similar to that referred to in *Chip Yew Brick Works Sdn. Bhd.'s* case (*supra*)

Then after referring to the Australian cases of *Kurt Keller Pty Ltd. & Ors. v. BMW Australia Ltd. & Ors.* [1984] 1 NSWLR 353 and *Kolback Securities Ltd v. Epoch Mining NL* [1987] 8 NSWLR 533, it was submitted that following the decisions in those two cases and in all the circumstances and upon the facts of this case before the Court, it was open for it to decide the issue and to hold that there are no serious questions to be tried and to refuse the injunction *in limine*.

Finally, Mr. Sri Ram referred to *Binder v. Alachouzos* [1972] 2 QBD 151, in which case the UK Court of Appeal held that the agreement in question was a *bona fide* compromise of the question of fact whether the original loans were unlawful moneylending transactions and it was not open to the defendant in that case to reopen the question of illegal moneylending in the plaintiff's action on that agreement. Counsel pointed out that in addition to that case, it was decided in *Holsworthy Urban District Council v. Rural District Council of Holsworthy* [1907] 2 Ch 62, that an agreement, having been entered into *bona fide* by both parties, was not rendered invalid by the fact that one of the claims included in the compromise subsequently proved to be unfounded in law. He pointed out that in this case after the compromise, there have also been part payments of the debt in question.

Mr. Lazar, leading Counsel for Insas, on the other hand referred me to the Australian case of *Fortuna Holdings Pty. Ltd. v. Deputy Federal Commissioner of Taxation* [1978] V.R. 83/ [1976-1977] 2 ACLR 349, in which case the Supreme Court of Victoria held *inter alia* that the grounds for obtaining an injunction to restrain filing or advertisement of a petition for winding-up include showing either:

(i) That the company would suffer irreparable harm and that the applicant has no chance of success, as where the applicant claims to be a creditor and will not be able to prove that status, or where the applicant alleges insolvency but will not be able to prove that the company is insolvent;

or

(ii) That the company would suffer irreparable harm and there is a genuine dispute on substantial grounds as to the company's indebtedness to the applicant.

Counsel stated that Nadinusa hoped to bring pressure on Insas by adopting the method of a petition rather than other and more appropriate remedies and that it was an improper use of the process, and Insas should be freed from the improper process being used by Nadinusa and an injunction should be granted. Counsel stated that the debt is disputed in this case and that Nadinusa is not entitled to present a petition as a creditor unless it is actually a creditor. In the ordinary circumstances, the procedures of a winding-up petition are not to be used to determine whether the petitioner is a creditor if the existence of his debt is genuinely disputed on substantial grounds. If a creditor's petition is based on a debt which is genuinely disputed on substantial grounds, usually Courts in the proper exercise of their discretion decline to make a winding-up order. He contended that if a person intends to present a petition based on a debt which is genuinely disputed on substantial grounds, a Court may restrain the presentation of a petition.

Counsel then referred to *T. Chellappah v. Official Assignee* [1971] 1 MLJ 24 and to s. 3 of the Moneylenders Ordinance 1951, which provides that "any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender", and submitted that it was up to Nadinusa to rebut that presumption.

In reply, Mr. Sri Ram also referred to the *Fortuna Holdings* case (*supra*) and pointed out that in that case the Court had dismissed the application for an injunction. He then pointed out that the parties in this case have agreed specifically that a petition may be presented if Insas defaulted and contended that Insas had not come to Court with clean hands.

The guidelines provided by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 are applicable where the facts are in dispute, but where issues are of law the Court could resolve them at the interlocutory stage. Thus the House of Lords has recently decided in *Associated British Ports v. Transport and General Workers Union* [1989] 1 WLR 939 that it would be wrong for a Court not to decide questions of law on an application for an interlocutory injunction in an appropriate case thereby disposing of the matter.

In this case Insas has raised the defence that Nadinusa was an unlicensed moneylender and that it was therefore barred from claiming any sum of money lent. On this issue one need only remind oneself that the Moneylenders Ordinance does not strike at moneylending but only at moneylenders and their loans. Here apart from a claim that Nadinusa is an unlicensed moneylender, I could not find nor was my attention drawn to any evidence to show that it is a moneylender.

In any case my attention has now been drawn to the correspondence between the parties' solicitors which shows that there was a *bona fide* compromise of the question of fact whether the loans were unlawful moneylending transactions and the Court would not now go behind the compromise as Insas was represented by Counsel and both parties have been legally advised. (*Binder v. Alachouzos*; (*supra*) see also Vol. 9 *Halsbury's Laws of England* (4th Edn.) para. 431]. In this respect, it is apt to refer to the following observations of Lord Denning MR in *Binder's* case:

> On the other hand, it is important that the Courts should enforce compromises which are agreed in good faith between lender and borrower. If the Court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a *bona fide* agreement of compromise. Otherwise, there could never be a compromise of such an action. Every case would have to go to the Court for final determination and decision. That cannot be right. There is nothing in the books except for some observations either way in *In re Campbell, Ex parte Seal* [1911] 2 KB 992. Farewell LJ said, at p. 997:
>
> > I am not prepared to hold that a moneylender can avoid the Act by obtaining judgment and then making terms for repayment of the judgment debt: ...
>
> But Kennedy LJ said, at pp. 998-999:
>
> > The defendant, in order to make good a plea of illegality, would have to show by evidence that the lender was a 'moneylender' within the Act ... If the borrower in such an action as the present does not choose to fight the disputable point, he cannot be entitled afterwards to reopen the judgment against him by alleging that he might successfully have relied upon a defence of illegality if he had adduced certain evidence to prove ... the case ...

I prefer to go by what Kennedy LJ said.

> In my judgment, a *bona fide* agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened. I agree with the Judge below that this agreement of compromise was binding and I would dismiss the appeal.

In the present case there was also a *bona fide* agreement of compromise as to whether Nadinusa is a moneylender or not. In this case there was also no undue advantage taken and both parties were represented and advised by competent lawyers. The agreement is binding and should not be reopened. As Insas has not shown that there is a serious question to be tried on substantial grounds, I realised that an interim injunction should not have been granted by me in chambers nearly four years ago! I therefore ordered in open Court on 5 June 1992, that my decision in chambers granting Insas the interim injunction be reversed, and in the exercise of my discretion, therefore dismissed Insas's summons-in-chambers dated 28 June 1988, with costs in the cause.

Also found at [1992] 4 CLJ 1859